United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1491

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 76-1491

UNITED STATES OF AMERICA,

Appellee,

-v-

FRANK AMENDOLA,

Appellant.

On Appeal From a Judgment of The United States District Court for the District of Connecticut

PETITION FOR REHEARING EN BANC

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AUTHORITIES CITED

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vs.

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PETITION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Statement of Issues

Pursuant to Rules 35 and 49(c) of the Rules of Appellate Procedure, the Appellant petitions this Honorable Court for a rehearing en banc, as the points of law which the petitioner is of the opinion the Court has either overlooked or misapprehended are:

1. (a) It found that both Section 3161(e) of the Speedy Trial Act and Rule 5(e) of the Connecticut Speedy Trial Plan require retrial within 60 days of the mistrial, but that violations of these mandates do not require dismissal of the

indictment;

(b) The Court further found that United States v. Didier, 542 F.2d. 1182 (2nd Cir. 1976) only applies if the government sought the delay for tactical purposes, yet neither the Plan, the Act, nor Didier stand for that proposition.

2. It held a violation of procedures for installing a Pen Register did not require suppression of the sole evidence against Appellant which holding is contrary to Application of the United States in Matter of Order, etc., 538 F.2d. 956 (2nd Cir. 1976), cert. granted, __U.S.__, 45 U.S.L.W. 3499 (Jan. 25, 1977) and U. S. v. Donovan, __U.S.__, 45 U.S.L.W. 4115 (Jan. 18, 1977).

I.

A.

Section 3161(e) of the Act was effective on passage and is not subject to Section 3163(c).

This Court held Section 3163(c) of the Act, the sanction of dismissal, becomes effective on July 1, 1979, and for that reason dismissal of the indictment is not warranted. However, Section 3163(c) refers to Section 3162 which does not in any way apply to Section 3161(e), retrials after mistrials. Neither Sections 3162 nor 3163 apply to retrials after mistrials. Section 3161(e) stands by itself; its language is mandatory and requires dismissal.

Section 3161(e)
"If the defendant is to be tried again following

> a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final." (Underlining added)

The reason set forth by the Court for not reversing the conviction on this ground, it is respectfully suggested, is not correct, as the only effective date of Section 3161(e), because it is excluded from Section 3162 and Section 3163, is on passage.

B.

This Court further held in the present case at Page 3535 "The preamble to the Plan which became effective July 1, 1976 says 'None of the sanctions encompassed in U.S.C. Section 3162 will become effective until July 1, 1979, the deadline mandated by Congress.'" That is true, but, as shown in (a), supra, Section 3162 does not apply to Section 3161(e), and therefore, as the Act requires dismissal, so does the Plan as they are identical, as was the prior Plan.

C.

United States v. Didier, 542 F.2d. 1182 (2nd Cir. 1976) is in direct conflict with this decision. At Page 1190 this Court stated "Faced with this prospect the interim rules at issue in the present case were promulgated. If they are to mean anything they must be enforced." In the present case this Court has held that a defendant must show that the government sought much of the delay for tactical purpose and the District Court failed to insist that deadlines be met, and

further held that if there was other criminal business which had to be disposed of, that would be an excuse for non-compliance. At Page 1188 of Didier this Court held "Neither was the Court's crowded calendar sufficient reason for the delay." That position is expressly contrary to the Court's holding in the present case.

At Page 1186 of Didier this Court held that a motion to dismiss for failure to retry within the time limited by the Rules is not one of first impression and states,

> "Although we have never ordered an indictment dismissed with prejudice for failure to abide by Rule 6 of the Southern District's 1973 Plan...we have repeatedly warned that future delays in retrying a defendant once tried might lead to such dismissal."

That is contrary to the holding in the present case. Further, in Didier at Page 1186 this Court approved its statement in U. S. v. Roemer, 514 F.2d. 1377 (2nd Cir. 1975),

> "...failure to do so in the future will not be treated lightly. Particularly under the generally more stringent requirements of the Speedy Trial Act of 1974...negligence of this sort displayed in this case is likely to lead to the dismissal of indictments..."

This statement is contrary to the present case.

At Page 1186, 7, of Didier this Court stated,

> "...We upheld the District Court's dismissal of indictment without prejudice because the defendant had not been retried within the 90-day period specified by Rule 6, following our Order for re-trial on December 16, 1974..."

That is contrary to the present case.

On Page 1187 of Didier this Court held,

> "Having been put on notice by that decision that responsibility for speedy trial enforcement rests primarily on the District Courts and on the government, not on the defendant, the government should have attempted to obtain the retrial within ninety days of the Drummond decision (handed down on February 11, 1975) or an explicit waiver of that ninety-day period from Appellant Didier..."

That holding is contrary to the present case.

It is further claimed that at Page 1188 of Didier this Court held that it was requiring the mandates of the Speedy Trial Act to be enforced particularly when Note 8 is read, and this is contrary to the holding in the present case.

II.

A tap and a Pen Register were installed on a co-defendant's telephone in January of 1973, and as a result thereof the government was led to Appellant's home and in May of 1973 a Pen Register was installed on that telephone. Neither a notice of inventory from the January tap and the Pen Register, nor the May Pen Register were served on this defendant, and this Court held at Page 3536, that this was a Rule 41(d) violation because of Application of the United States in Matter of Order, etc., 538 F.2d. 956 (2nd Cir. 1976), cert. granted, __U.S.__, 45 U.S.L.W. 3499 (Jan. 25, 1977), but this Court held it did not require suppression of the evidence.

This holding is inconsistent with U. S. v. Donovan, __U.S.__, 45 U.S.L.W. 4115 (Jan. 18, 1977), in that whether it is a Rule 41(d) violation, or a 2518(1)(b)(iv), a 2518(8)(d), or a 2518(10)(a)(1) violation, the government must justify

the failure to comply with the mandates of the statute. This it has not done, nor does the opinion in this case find it did.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing should be granted and should be reviewed by this Court sitting en banc and his conviction reversed.

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CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition and that my opinion is well founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

Roger J. Frechette

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 1977, I served the foregoing Petition for Rehearing En Banc upon Peter Casey, Esq., 450 Main Street, Hartford, Connecticut, by causing copies to be mailed, postage prepaid.

Roger J. Frechette

ADDENDUM

TITLE 18, UNITED STATES CODE

Section 2518 (1)(b)(iv):

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

...(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including

...(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;"

Section 2518(8)(d):

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of --

(1) the fact of the entry of the order or the application
(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application, and
(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of

justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

Section 2518(10)(a)(1):

"(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communications, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;"

Section 3161(e):

"(c) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final..."

Section 3162. Sanctions

"(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors; the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection

with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The Court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Added Pub.L. 93--619, Title I, §101, Jan. 3, 1975, 88 Stat. 2079.

Section 3163. Effective dates

"(a) The time limitation in section 3161(b) of this chapter--

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter--

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975."

REVISED RULE 50(b) PLAN, EFFECTIVE JULY 1, 1976

Pursuant to the requirements of Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974, (18 U.S.C. Chapter 208), and the Federal Juvenile Delinquency Act 18 U.S.C., Sections 5036, 5037), the Judges of the United States District Court for the District of Connecticut have adopted the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

Throughout this Revised Rule 50(b) Plan (hereinafter Plan), the District of Connecticut has decided to adopt, effective July 1, 1976, the statutory time limits for July 1, 1979, mandated by the Speedy Trial Act of 1974. By accelerating the effective date of the 1979 time limits, it is hoped that problems in compliance will be identified and solved before sanctions are applicable. While we are adopting the 1979 time limits effective July 1, 1976, none of the sanctions encompassed in 18 U.S.C., Section 3162 will become effective until July 1, 1979, the deadline mandated by Congress...

...5. Time Within Which Trial Must Commence.

...(b) Measurement of Time Periods. For purposes of this Rule (and not for purposes of considering Double Jeopardy claims):..

(2) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(3) A trial in a non-jury case shall be deemed to commence on the day the case is called when the judge orders that the case have an "on trial" status.

...(e) Retrial. The retrial of a defendant shall commence within 60 days from the date the order occasioning the retrial becomes final. If the retrial follows an appeal or collateral attack, the Court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 60 days impractical. The extended period shall not exceed 180 days. (Section 3161(e))...